IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 61982-9-I
	)	DIVISION ONE
GLENN G. NICHOLS,	)	
	)	UNPUBLISHED OPINION
Petitioner.	)	
	)	FILED: November 24, 2008

PER CURIAM. In this personal restraint proceeding Glenn Nichols contends that the Department of Corrections (DOC) is unlawfully denying him the benefit of the statute providing certain offenders with a 50 percent sentence reduction for good prison behavior. In light of the strength of Nichols' showing that DOC has relied on a nonexistent conviction to deny Nichols the benefit of the statute, the limited nature of the DOC's response to the petition and other special circumstances present here, we transfer the matter to the King County Superior Court for Nichols' sentencing judge to resolve the petition.

FACTS

Nichols was convicted of possession of a controlled substance with intent to deliver in King County Superior Court No. 04-1-01099-0 SEA. Nichols received a sentence of 60 months of confinement and 9 to 12 months of community placement in March, 2005, but remained in the King County Jail until October 2005, when he was transferred to a DOC facility. According to Nichols, he was told at the time of his initial custody designation on October 31, 2005 that

he would

qualify for 50 percent reduction in his sentence for good behavior by DOC staff Richard Bowman. After he was transferred to the DOC Monroe facility, however, he learned that DOC had officially classified him as ineligible for the 50 percent reduction. Nichols thereafter filed formal requests for an explanation of the reasons, and received an initial explanation from a custodial officer, Al Stickney, that he did not qualify because he had two domestic violence misdemeanor assault convictions.

Nichols then filed additional complaints, asking that those supposed convictions be expunged from his institutional records because they did not exist. Nichols eventually received a written explanation from DOC Program Manager Kevin Mauss on May 25, 2007. Mauss wrote that because of Nichols' concerns, he had requested that his case be reviewed, and that a counselor had conducted a review of Nichols' risk assessment. In one portion of the letter response, Mauss wrote that "You do not appear to have any past convictions that would exclude you from the 5990 considerations", but in a later portion stated that because Nichols had self-reported a conviction for arson in the first degree as a juvenile in 1969, Nichols therefore was excluded by operation of the law from the 50 percent reduction because a first degree arson was both a violent crime and a crime against persons. See Petition, Exhibit 8.

Nichols responded on June 7 with a letter pointing out the seeming

contradiction in Mauss's letter with respect to his criminal history and affirmatively

denying that he had any arson conviction. Citing the requirement in RCW 9.94A.030(35) that DOC risk assessments are not to be based on "unconfirmed or unconfirmable allegations", he provided a copy of his criminal history, which did not list any such conviction. Nichols challenged DOC to produce a judgment and sentence showing there was a conviction or else remove it from the consideration of his eligibility for the 50 percent reduction in his sentence.

Mauss replied with another letter on June 18, 2007. In it he identified the source of the DOC's belief that Nichols had the arson conviction as a presentence investigation from 1994, which stated that Nichols had reported that he was convicted of "arson" as a juvenile in 1969. Mauss wrote that Nichols' file indicated Nichols had confirmed that information in interviews with DOC staff in December 2005 and May 2007. Because of the consistency in Nichols' self-report, the risk assessment relied on that information to conclude that Nichols was not legally eligible for the 50 percent reduction. The letter ended with the indication that Mauss considered the matter closed and would refer any further correspondence to the classification staff at the facility where Nichols was housed.

Nichols continued to file additional complaints and requests for reassessment. In August 2007, he received a letter from Prince Williams at the Monroe facility. Williams wrote that even though the judgment and sentence

Nichols had provided did not list any arson conviction, “[y]our self-report is all that

is needed to raise the question of its existence" and therefore the results of Nichols' assessment would not be changed and the matter was closed. Petition, at Exhibit 12.

Nichols continued to seek additional information, contacting his former counsel and the King County Superior Court, who confirmed his position that his criminal history did not contain a juvenile arson conviction or adjudication. He then filed a formal challenge to DOC's version of his criminal history under RCW 10.97.080, 090 and WAC 446-20-140 with DOC. On January 8, 2008, he received a response from Dana Lowman that the DOC records staff declined to take any action because they considered the matter closed based on Mauss's and Williams' earlier letters.

Nichols then provided his information to the acting superintendent at the Monroe Correctional Complex. He explained he had followed the process prescribed in the Washington Administrative Code for challenging the accuracy of criminal history information and asked for the DOC to either prove he had an arson conviction or correct the erroneous information in his file. In February 2008, he received a response indicating his self-report of the conviction was considered verified by the 1994 presentence report.

Nichols thereafter filed his petition for writ of habeas corpus in King County Superior Court. The petition has been transferred to this court for

consideration as a personal restraint petition.

DECISION

At issue is Nichols' qualification for 50 percent earned early release under Senate Bill 5990, now codified at RCW 9.94A.728(1)(b). Under this statute certain

offenders may qualify for earned early release at 50 percent of their total sentence. To qualify, an offender must not have certain types of prior convictions and must be classified in the two lowest risk categories DOC uses in conducting risk assessments. In re Pers. Restraint of Adams, 132 Wn. App. 640, 644, 134 P.3d 1176 (2006). Because Mr. Nichols challenges a decision from which he had "no previous or alternative avenue for obtaining state judicial review," RAP 16.4 requires only that he show he has been unlawfully restrained. In re Pers. Restraint of Liptrap, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005). A restraint is unlawful if the challenged action of DOC violates the laws of the state of Washington. Id.

In his petition, Nichols asked that DOC be required to provide proof of the supposed 1969 arson conviction, and if unable to do so, be ordered to release him from custody because he has now served more than 50 percent of his sentence. He contends that DOC's actions are contrary to Washington law and his due process limited liberty interest in release under the statute.

DOC's limited response does not provide any extrinsic proof that Nichols

has an arson conviction. Instead, it focuses exclusively on Nichols' citation to Adams and his claim of a liberty interest. In Adams, DOC conducted an initial risk assessment of a defendant and classified him as an RM-C offender, therefore eligible for a 50 percent sentence reduction. Later reassessments placed him in the ineligible RM-B, category, however. This court held that under those circumstances "minimum due process requires written notice of the reasons DOC

is seeking to change [the offender's] classification and an opportunity to challenge the facts DOC relied on from his files to reach that decision." Adams, 132 Wn. App. 640, 653, 134 P.3d 1176.

DOC argues that Adams is inapplicable and Nichols has no due process liberty interest because Nichols was never deemed eligible for 50 percent time. Although this is a correct statement of Adams' holding, this response is problematic for two reasons.

First, DOC fails to address what is apparently a factual dispute presented by the petition. Nichols stated a factual claim that he was initially told by DOC staff that he was eligible, but DOC's entire argument rests on the apparent premise that he was not. See RAP 16.9 (response to petition should identify all disputed questions of fact).

Second, and more important, even if DOC's position regarding the limited

liberty interest under Adams is correct, it does not answer Nichols' claim that he is being restrained in violation of the law simply because his release date is clearly based on erroneous criminal history information. And Nichols has presented substantial evidence that could support a showing that DOC is indeed relying on incorrect information regarding Nichols' criminal history in making the decision to find him ineligible for the 50 percent sentence reduction.[1]

If it were determined as a matter of fact that Nichols does not possess an arson conviction, then we would agree that he has made the requisite showing of unlawful action by DOC required in this proceeding. Decisions by the DOC regarding risk classifications are not to be made on the basis of "unconfirmed or unconfirmable allegations." RCW 9.94A.030. It is, moreover, the legislatively declared policy of the State of Washington to provide "completeness, accuracy, confidentiality, and security of criminal history record information[.]" RCW 10.97.010. To that end, criminal justice agencies, such as the DOC, are

[1] Nichols' sentencing judge, the Hon. Sharon Armstrong, sent Nichols a letter at the time she transferred his petition to this court. In the letter, Judge Armstrong recounted that she had inquired into Nichols' juvenile court records, and found records that a 1967 incident when Nichols was six years old in which a building under construction was burned resulted in a finding that he was a dependent child and his placement in foster care. Because of Nichols' young age, no criminal charges were filed and he was not convicted of any crime as a result of the incident. Given that his records from all other criminal justice agencies show no conviction and that in 1967, as now, "[c]hildren under the age of eight years old are incapable of committing crime" as a matter of statutory law, Nichols has made a strong case that he possesses no arson conviction. See RCW 9A.04.050; former RCW 9.01.111(1974) and former RCW 10.46.100 (1966).

generally required to allow the subject of their records to see and challenge criminal history record information generated by that agency. RCW 10.97.080, WAC 446-20-120.

Here, however, Nichols' attempts to appropriately employ these review mechanisms to correct DOC's misinformation about his criminal history were apparently denied by DOC on the legally untenable theory that the matter was closed by the May and June, 2007 letters.

Because the DOC's response is so limited, it is not clear whether DOC nonetheless still means to assert that Nichols has an arson conviction as a matter of fact. If there is such a factual dispute, it is appropriately resolved in the trial court, not in this court. Moreover it also is not clear that DOC would agree with Nichols that a determination that he had no arson conviction would necessarily change the determination of his risk category to a level that would result in application of the 50 percent standard. That question, as well, may require the resolution of disputed facts or may present legal issues yet unaddressed.

Under other circumstances, this court would direct supplemental briefing to obtain a more complete response from DOC before determining what further steps to take in resolving this matter. But if Nichols is correct it appears he is entitled to immediate release. And if DOC does mean to continue to assert

Nichols has the challenged conviction, or otherwise disputes that the appropriate remedy would be Nichols' release, the matter would eventually be transferred to the Superior Court to resolve disputed questions of fact in any event. Accordingly, the best course of action in this unusual situation is to transfer this matter to the King County Superior Court for appointment of counsel for Nichols and resolution of all dispositive factual and legal issues raised in the petition.

At the hearing, the DOC shall take an express position as to whether Nichols has an arson conviction. If it concedes that he does not, or if the court finds as a matter of fact that he does not, then the court should consider whether the resolution of that issue is dispositive of whether Nichols is entitled to the 50 percent sentence reduction. If DOC agrees that it is, then Nichols should be released. And if DOC does not so agree, the court is expressly authorized to resolve any remaining questions of law or fact to decide the petition on the merits.

It is our intent that counsel should be appointed and a hearing held addressing these matters as soon as practicable. The hearing should be conducted, if at all possible, by Judge Armstrong, who is already familiar with the issues.[2] Regardless of which judge hears the matter, that judge is authorized to take any necessary steps to effectuate the interests of justice, including the grant or denial of temporary relief upon the request of Nichols before, during, or after the hearing. At the conclusion of the proceeding, the court should enter such findings of fact and conclusions of law or other orders as are appropriate to the circumstances. See RAP 16.14(b).

[2] Ordinarily, when the Chief Judge or Acting Chief Judge transfers a personal restraint petition to superior court for resolution of factual issues, the matter is heard by a judge who was not previously involved in the case. See RAP 16.12. But here, there is no allegation that Judge Armstrong committed any legal error, only that the DOC has erred in executing Nichols' sentence. Under the circumstances, it is appropriate to direct that Judge Armstrong hear the matter. See RAP 1.2(c).

Petition transferred, with directions.

For the court: